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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT **SENSITIVE**

MUR: 5840
DATE COMPLAINT FILED: October 11, 2006
DATE OF NOTIFICATION: October 17, 2006
DATE ACTIVATED: February 12, 2007

EXPIRATION OF STATUTE OF
LIMITATIONS: January 17, 2011

RAD REFFERRAL: 06L-35
DATE OF REFERRAL: December 28, 2006
DATE ACTIVATED: March 12, 2007

EXPIRATION OF STATUTE OF
LIMITATIONS: August 21, 2011

COMPLAINANT:

Arizona Republican Party

RESPONDENTS:

Ellen Simon for Congress and Carter Olson, in his
official capacity as treasurer
Ellen Simon

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(13)(a)
2 U.S.C. § 434(b)
2 U.S.C. § 441a-1(b)
11 C.F.R. § 100.12
11 C.F.R. § 104.3
11 C.F.R. § 104.5
11 C.F.R. § 104.7
11 C.F.R. § 104.8
11 C.F.R. § 400.4
11 C.F.R. § 400.21
11 C.F.R. § 400.25

INTERNAL REPORTS CHECKED:

Disclosure Reports
RAD Referral Materials
RAD Requests for Additional Information

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Arizona Republican Party filed a complaint alleging that Ellen Simon for Congress and Carter Olson, in his official capacity as treasurer (the "Committee"), violated the reporting requirements of the Federal Election Campaign Act of 1971, as amended (the "Act"), by initially reporting a bank loan as a personal contribution from candidate Ellen Simon ("Simon"). The complaint also alleged that the Committee failed to disclose adequate contributor information and failed to establish that it used best efforts to obtain that information. Finally, the complaint alleged that the Committee violated the Act by failing to file its first disclosure report as soon as it received over \$5,000 in contributions.

In addition, the Reports Analysis Division ("RAD") referred the Committee for its failure to timely file a 24-Hour Notice of Expenditure from Candidate's Personal Funds, FEC FORM 10 ("FEC FORM 10"), after Simon contributed in excess of \$350,000 to her campaign, contributions she funded in part through the bank loan discussed above. Because the RAD referral and the complaint-generated matter involve the same bank loan, we recommend that the referral be merged with the complaint-generated matter.

For the reasons set forth below, we conclude that there is no basis to find that the Committee violated the reporting requirements of the Act with respect to the filing of the its first report, but recommend that the Federal Election Commission (the "Commission" or the "FEC") find reason to believe the Committee violated 2 U.S.C. § 434(b) by erroneously reporting the bank loan and a loan from the candidate as contributions from the candidate and by failing to report contributors' employer and occupation information. In addition, we recommend the Commission find reason to believe that the Committee and Ellen Simon violated the reporting requirements of 2 U.S.C. § 441a-1(b) by failing to file a timely FEC FORM 10.

II. FACTUAL AND LEGAL ANALYSIS

A. Filing of First Report

Ellen Simon was a 2006 Congressional candidate in Arizona's 1st congressional district. She filed a Statement of Candidacy and Statement of Organization on May 3, 2006. The Committee filed its first report, the 2006 July Quarterly Report, on July 14, 2006. In that report, the Committee disclosed contributions totaling \$503,326, the first of which was on May 5, 2006, from the candidate, in the amount of \$50,000.

The Complaint alleged that the Committee should have filed a report with the FEC as soon as the Committee raised or spent \$5,000 instead of reporting the receipt of the \$50,000 in the July Quarterly Report, which was the Committee's next-scheduled report. In its response to the Complaint, the Committee asserted that it was not required to notify the FEC when it reached \$5,000 in contributions or expenditures.

Pursuant to 2 U.S.C. § 434(a)(2)(A)(iii), campaign committees for House of Representative candidates shall file Quarterly Reports by the 15th day following the close of the calendar quarter. *See also* 11 C.F.R. § 104.5(a). Simon became a candidate when she filed her Statement of Candidacy on May 3, 2006. Therefore, the first report the Committee was required to file was the July Quarterly Report, which it filed in a timely fashion on July 14, 2006. Contrary to the Complaint's assertion, the receipt or expenditure of \$5,000 did not trigger a requirement that the Committee file a report prior to the July Quarterly Report. Accordingly, there is no basis to conclude that the Committee violated the reporting requirements of the Act with respect to the filing of the Committee's first report.

B. The Loans and FEC FORM 10

In its 2006 July Quarterly Report, the Committee reported that Simon made two contributions to her campaign: the \$50,000 contribution on May 5, 2006, as discussed *supra* at 2-3, and a \$225,000 contribution on June 29, 2006, which was funded by a draw on a revolving line of credit from Wells Fargo Bank. The line of credit was secured by Simon's residence. The Committee reported both transactions as contributions from the candidate of her own personal funds.

On August 21, 2006, Simon made a second draw on the line of credit, in the amount of \$250,000, and again used the money for her campaign. Six days later, on August 27, 2006, the Committee filed an FEC FORM 10, in which it disclosed the \$250,000 expenditure. The \$250,000 expenditure brought total personal funds expended by the candidate to \$525,000.

On August 31, 2006, the Committee filed an amendment to the July Quarterly Report, in which it re-characterized the \$50,000 contribution made on May 5th as a loan from the candidate and the \$225,000 contribution made on June 29th as a loan from Wells Fargo Bank, guaranteed by the candidate. The following day, the Committee filed another amended July Quarterly Report, to which it attached a copy of the Wells Fargo Bank loan agreement. In memoranda attached to the each of the amended reports, the Committee explained, "loans to the Committee were initially reported as Candidate Personal Funds in error" and, with respect to the Wells Fargo transaction, stated that it was "Originally reported as a loan from the Candidate in error. This deposit was in fact a drawdown from a loan guaranteed from [sic] the Candidate."

In a Request for Additional Information ("RFI"), dated September 19, 2006, RAD explained that FEC FORM 10s must be filed when a candidate for the House of Representatives makes more than \$350,000 in expenditures from personal funds and noted that the FEC FORM

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10 that the Committee filed on August 27, 2006 appeared to have been filed outside of the 24-hour period. In response to the RFAI, a consultant to the Committee confirmed that the Committee had exceeded the \$350,000 reporting threshold on August 21, 2006 and stated that Committee staff had not notified him of the expenditure that triggered the 24-hour reporting requirement until August 27, 2006.

With respect to the candidate's loans, the Complaint alleged that Simon intentionally misrepresented the facts when her Committee reported the \$275,000 as a contribution from the candidate of personal funds rather than a bank loan.¹ In its response to the Complaint, the Committee admitted that the loan was originally erroneously reported as a personal contribution from the candidate. The Committee stated that the error was inadvertent and was remedied. It asserted that it cooperated fully with RAD, providing it with all the information that it sought.

1. Reporting of Loans

The Act requires an authorized committee to report contributions from its candidate, loans made or guaranteed by its candidate and all other loans. 2 U.S.C. § 434(b)(2)(B), (G), and (H). These loans must be reported on Schedule C. 11 C.F.R. § 104.3(d). When a candidate obtains a loan from a lending institution and uses those funds in his or her campaign, the loan must be itemized as a loan from the lender to the committee, rather than as a loan from the candidate to the committee. 2 U.S.C. § 434(b)(3)(E); 11 C.F.R. § 104.3(a)(3)(vii)(B) and (a)(4)(iv). Details of such

¹ The Complaint erroneously states that the total amount of the bank loan was \$275,000. The bank loan was only in the amount of \$225,000. The other \$50,000 loan consisted of a loan Ms. Simon made to her campaign from personal funds.

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loans must be reported on Schedule C-1. 11 C.F.R. § 104.3(d)(1).²

In this instance, the candidate's \$50,000 loan and the \$225,000 draw on the Wells Fargo Bank home equity line of credit were first reported, erroneously, as contributions from the candidate, rather than loans. Accordingly, the Committee failed to file the required Schedules C and C-1. Subsequently, the Committee filed amended reports that included the schedules and disclosed that the funds consisted of a loan from the candidate and a bank loan. The Complaint cited no evidence, nor is there any available information, in support of its claim that this violation was intentional. Nevertheless, the \$275,000 was improperly reported in the original 2006 July Quarterly Report. Accordingly, we recommend that the Commission find that there is reason to believe that Ellen Simon for Congress and Carter Olson, in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing, in the original 2006 July Quarterly Report, to report the \$50,000 as a loan from Ellen Simon to her campaign and the \$225,000 as the proceeds of a home equity line of credit from Wells Fargo Bank to Ellen Simon.

2. 24-Hour Reporting Requirement

When a candidate for the United States House of Representatives "makes or obligates to make an aggregate amount of expenditures from personal funds in excess of \$350,000 in connection with any election" the candidate or his authorized committee must notify the Commission by filing a notification of the expenditure (FEC FORM 10) with the Commission

² Schedule C-1 requires that the following information be disclosed: (1) the date and amount of the loan or line of credit; (2) the interest rate and repayment schedule of the loan, or each draw on the line of credit; (3) the types and value of traditional collateral or other sources of repayment securing the loan or line of credit and whether that security interest is perfected; and (4) an explanation of the basis of the credit established if the bases in (3) are not applicable. 11 C.F.R. § 104.3(d)(1)(i)-(iv). The committee treasurer must sign the schedule on Line G and attach a copy of the loan agreement. 11 C.F.R. § 104.3(d)(2). The lending institution must sign the statement on Line I, attesting that: the terms of the loan and other information regarding the extension of the loan are accurate, the terms and condition of the loan are no more favorable than those extended to similarly situated borrowers, the lending institution is aware that the loan must be made on a basis which assures repayment, and that in making the loan it has complied with the regulations set forth at 11 C.F.R. §§ 100.7(b)(11) and 100.8(b)(12).

1 within twenty-four hours after exceeding the threshold. 2 U.S.C. § 441a-1(b)(1)(C); 11 C.F.R.
2 § 400.21(b). An expenditure from personal funds includes direct contributions as well as loans
3 made by a candidate using personal funds or a loan secured using such funds to the candidate's
4 authorized committee.³ 2 U.S.C. § 441a-1(b)(1)(A); 11 C.F.R. § 400.4; *see also* MUR 5730
5 (Charles Taylor for Congress); MUR 5623 (Mike Crotts for Congress). The committee must
6 also send copies of the FEC FORM 10 to each opposing candidate and the national party of each
7 such candidate within 24 hours of the expenditure. 2 U.S.C. § 441a-1(b)(1)(F); 11 C.F.R.
8 § 400.21(b). Although the notification is signed by the committee treasurer, the candidate is
9 responsible for ensuring that it is timely filed by his or her principal campaign committee.
10 11 C.F.R. § 400.25.

11 In this matter, the FEC FORM 10 was filed five days late. The candidate made the
12 second draw on the Wells Fargo home equity line of credit and forwarded the resulting \$250,000
13 to her committee on August 21, 2006. The \$250,000 caused Simon to exceed the \$350,000
14 reporting threshold and triggered the requirement that her Committee file notice of the
15 transaction with the Commission and opposing candidates and their parties within 24 hours, *i.e.*,
16 by August 22, 2006. The Committee did not file its FEC FORM 10 until August 27, 2006.

17 Because the Committee did not file a 24-Hour Notice of Expenditure from Candidate's
18 Personal Funds (FEC FORM 10) in a timely fashion and because the candidates is responsible
19 for ensuring that the FEC FORM 10 is timely filed, we recommend that the Commission find
20 reason to believe that Ellen Simon for Congress and Carter Olson, in his official capacity as
21 treasurer, and Ellen Simon violated 2 U.S.C. § 441a-1(b).

³ The term "personal funds" includes amounts derived from any asset that, under applicable State law, at the time the individual became a candidate, the candidate had right of access to or control over, and with respect to which the candidate had legal and rightful title or an equitable interest. 11 C.F.R. § 100.33.

C. Best Efforts

In its 2006 Pre-Primary Report, filed on August 31, 2006, the Committee failed to provide employment or occupation information for 17 contributions out of the 51 contributions disclosed in the reporting period. On September 19, 2006, RAD sent an RFAI to the Committee, acknowledging that the Committee had previously established that it had been using best efforts to obtain occupation and employer information for contributors, but noting that the Pre-Primary Report showed a "significant increase in the number of entries for which the occupations and/or employers are not provided."

On October 8, 2006, the Committee filed an amended Pre-Primary Report that included a memorandum entry responding to the RFAI. In that memorandum, the Committee described its best efforts as follows: original direct mail solicitations include contributor cards that request the required information and explain that federal law requires the Committee to request and report the information; at fundraising events, when checks are received, contributors are asked to fill out the cards; Committee staff follow up on contributions in excess of \$200 by phone on a monthly basis; every 30 days, the Committee sends a letter request for the missing information with forms and a pre-addressed, stamped return envelope; and, if contributor information comes in after the close of the reporting period, the Committee includes the information in an amended report. Nevertheless, the amended Pre-Primary Report provided occupation and employer information for only 2 of the 17 contributions at issue, leaving 15 contributions totaling \$15,150 for the reporting period with incomplete contributor information.

The Complaint alleged that Simon "has only amended her reports to say 'best effort,' but does not provide documentation that proves she has made this best effort." In response to the

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1 Complaint, the Committee reiterated its response to the RFAI, but provided no specific
2 information or documentation for its efforts to obtain the missing contributor information.

3 The Act requires candidate committees to identify persons who make contributions that,
4 when aggregated, exceed \$200 for the election cycle. 2 U.S.C. § 434(b)(3)(A). The Act and the
5 regulations define "identification" to include providing the person's name, address, occupation
6 and name of employer. 2 U.S.C. § 431(13)(a); 11 C.F.R. § 100.12. If the contribution is not
7 accompanied by all of the contributor information required to be reported, the committee must
8 undertake "best efforts" to obtain the missing information. 11 C.F.R. § 104.7. Specifically, the
9 committee treasurer must make at least one effort within 30 days of receipt of the contribution to
10 obtain the missing information; the effort may be in writing or it may be an oral request,
11 documented in writing; it may not include material on any other subject and may not solicit any
12 contribution; and if in writing, it must clearly ask for the missing information and must be
13 accompanied by a pre-addressed return post card or envelope for the response. 11 C.F.R.
14 § 104.7(b)(2). Written requests for missing information by authorized committees, such as the
15 Committee, must include the language along the following lines:

16 Federal law requires us to use our best efforts to collect and report the
17 name, mailing address, occupation and name of employer of individuals
18 whose contributions exceed \$200 in an election cycle
19

20 or
21

22 To comply with Federal law, we must use best efforts to obtain, maintain,
23 and submit the name, mailing address, occupation and name of employer
24 of individuals whose contributions exceed \$200 per election cycle.
25

26 11 C.F.R. § 104.7(b)(1).

27 In this matter, 15 contributions have deficient contributor information in the Pre-Primary
28 Report. These contributions constitute approximately 30% of total contributions for the period.
29 Furthermore, the Committee has provided no documentation substantiating its efforts to comply

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1 with the law. Accordingly, we recommend that the Commission find reason to believe Ellen
2 Simon for Congress and Carter Olson, in his official capacity as treasurer, failed to exercise best
3 efforts in obtaining contributor information and thus violated the reporting requirements of
4 2 U.S.C. § 434(b).

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IV. **RECOMMENDATIONS**

1. Merge RAD Referral 06L-35 with MUR 5840.
2. Find reason to believe that Ellen Simon for Congress and Carter Olson, in his official capacity as treasurer, violated 2 U.S.C. § 434(b).
3. Find reason to believe that Ellen Simon, Ellen Simon for Congress and Carter Olson, in his official capacity as treasurer, violated 2 U.S.C. § 441a-1(b).
4. Approve the attached Factual and Legal Analysis.
- 5.
- 6.
7. Approve the appropriate letters.

Thomaseia P. Duncan
General Counsel


Date

7/20/07

BY:


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